In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 75-1767

Y. HATA & COMPANY, LIMITED, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MINORU HATA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for Ninth Circuit in the above entitled case.

OPINION BELOW

The per curiam opinion in the Court of Appeals, as yet unreported, is printed as Appendix A, pp. i-x, to this petition. The opinion affirms the convictions of Minoru Hata and of Y. Hata & Co. Ltd. as given in Appendix B, pp. xi-xv.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

In the prosecution of an individual or a corporation charged with the crime of causing or allowing the adulteration of food:

1. Must the Grand Jury be presented with exculpatory evidence in the possession or control of the prosecutor under the Fifth Amendment to the Constitution.
2. Did the trial court in this case err in failing to give an instruction on "objective impossibility" as enunciated in *United States v. Park,* 421 U.S. 658 (1975).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1042, as amended, provides:

a. Section 305 [21 U.S.C. §335]

> Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

b. Section 301 (k) [21 U.S.C. §331 (k)]

> The following acts and causing thereof are prohibited:
>
> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any

other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

c. Section 303•[21 U.S.C. §333]

(a) Any person who violates a provision of section 301 shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000 or both.

STATEMENT

Petitioners Y. Hata & Co. and its president Minoru Hata were tried by jury in the United States District Court for the District of Hawaii on three counts of alleged violations of Section 301 (k) of the Food, Drug, and Cosmetic Act, *supra,* regarding the storage of food in a portion of their warehouse in Honolulu, Hawaii. The events before and after this jury trial are as follows:

(a) Y. Hata & Co. responds to a prior conviction.

On August 9, 1971 Y. Hata & Co., in regard to a food storage warehouse on the island of Maui, Hawaii, had plead guilty to misdemeanor violations of the Federal Food, Drug & Cosmetic Act, including the presence of birds in the warehouse. Thus ended the government's first criminal prosecution, Action No. 12,753 in the U.S. District Court, District of Hawaii. Judge C. Nils Tavares, after reviewing the probation report, finded Y. Hata & Co. five dollars plus court costs in light of the "constant effort" Y. Hata & Co. was making to maintain and improve good sanitation practices at its warehouses.

Three days prior to the above plea the attorney for Y. Hata & Co. had contacted the Director of the State Fish and Game Division in an effort to find a solution to the problem of bird access to the warehouse. The Director responded by issuing a permit to destroy the birds which were protected by State statutes, but had no practical recommendations for keeping the birds out. (App. C, pp. xvi-xix) Y. Hata & Co. representatives contacted other experts to find a solution to the bird problem.

(b) FDA undertakes new inspection and holds an administrative hearing.

Beginning on May 31, 1972 and lasting until June 6, 1972, federal Food & Drug Inspector Ray G. Warthen inspected Y. Hata & Co.'s warehouse in Honolulu, Hawaii. As a result of the inspection, new charges against Y. Hata & Co. and its employees were brought by the federal Food & Drug Administration.

On October 31, 1972, representatives of petitioners attended an FDA administrative hearing in San Francisco under Section 305 of the Food, Drug and Cosmetic Act, *supra*. The FDA hearing officer and FDA hearing forms assured petitioners that all the evidence presented at the administrative hearing would be made part of the record in this matter. With these assurances, petitioners in good faith presented the "Statement of Y. Hata & Co." containing information favorable and unfavorable to the petitioners. Petitioners believed that the "Statement of Y. Hata & Co." would be presented to the Justice Department and to the grand jury in Hawaii for their determination on whether criminal proceedings should be instituted against petitioners.

(c) Prosecutors withhold exculpatory evidence from grand jury.

The FDA's San Francisco District Office did not transmit the administrative hearing record to the Justice Department. Therefore on July 10, 1973 petitioners forwarded the "Statement of Y. Hata & Co. Ltd." to the Justice Department along with a request that it reconsider taking the FDA-recommended court action against petitioners.

The Justice Department continued the criminal prosecution, but the Assistant U.S. Attorney in Hawaii did agree to allow petitioners' attorney to present the written "Statement of Y. Hata & Co., Inc." to the Grand Jury. However government officials in Washington D.C. learned of said agreement and overruled it:

On December 10, 1973, the prosecution obtained an Indictment without the Grand Jury ever having seen the exculpatory evidence presented in the written "Statement of Y. Hata & Co., Ltd." (App. D, pp. xx-xxi. Stipulation of Facts).

(d) Pre-trial motion and trial instruction request are denied.

On August 8, 1974 petitioners filed a motion to dismiss the indictment on several grounds, including the withholding of exculpatory evidence from the grand jury. The U.S. District Court denied the motion to dismiss the indictment as follows:

> "The Court: Let us assume for the purpose of argument that this exhibit 5 [Statement of Y. Hata & Co.] proves beyond a shadow of a doubt, beyond all reasonable possibility of error, that the defendants are innocent. What am I supposed to do with that?
>
> Mr. Kamo: Does it raise a question in the Court's mind of I wonder why this information was not submitted to the Grand Jury, or why it was not forwarded from the hearing officer . . .
>
> The Court: You raised that question. I said I've already ruled on that and I'll make you a record so you can take it back up to the Ninth. In the Ninth Circuit, the U.S. Attorney is not required to present exculpatory evidence to the Grand Jury."

The matter was brought to trial in November of 1974. At the conclusion of the trial the judge rejected petitioners' proposed instructions, including an instruction on "objective impossibility" as a defense.

Instead the court's charge consisted in large part of instructions as submitted by the government, despite petitioners' objections.

After a seven day trial, the jury returned a verdict of "Not Guilty" to Counts I and II but found defendants "Guilty" as to amended Count III. Count III had originally alleged that stored rice in the possession of Y. Hata & Co. had been contaminated due to the presence of birds in their warehouse, but had been amended during trial. Amended Count III charged only that Y. Hata had not prevented all access of birds into their warehouse in Honolulu in 1972, resulting in a situation whereby stored rice could have become contaminated. On the amended Count III, the trial court imposed a $3,000 fine against Y. Hata & Co. for a felony (second offense) and a $500 fine against its president, Minoru Hata, for a misdemeanor (first offense). (App. B, pp. xii and xv)

(e) Appeal is rejected.

Petitioners appealed their conviction on the following grounds: first, that it was objectively impossible for them to have prevented entirely the access of birds into the Honolulu warehouse in 1972 and that the trial court erred in not instructing the jury to consider the "objective impossibility" defense, and secondly, that the government engaged in a discriminatory prosecution following the imposition of only a very small penalty as an outcome of its first prosecution. The latter ground included the intentional withholding of exculpatory evidence from the grand jury by the government.

Petitioners now narrow the issues, first alleging that the appellate court has rendered a faulty decision regarding the duty of the grand jury in the federal criminal justice system. The second ground of this final appeal is that the trial jury made its decision on the basis of improper instruction as to the law.

REASON FOR GRANTING THE WRIT

A) THE FUNCTION OF THE GRAND JURY AS PROTECTION FOR CITIZENS AGAINST UNFOUNDED CRIMINAL PROSECUTIONS NEEDS CLARIFICATION.

(1) This case offers opportunity to resolve a serious conflict on whether the grand jury must be presented with available exculpatory evidence as well as evidence of guilt.

The framers of the Bill of Rights insisted upon indictment by the Grand Jury as an indispensable pre-condition to the trial of any person on a serious criminal charge.[1] The appellate court's opinion rejects petitioners' interpretation as to a major function of this Constitutional mandate, including contentions "that the prosecution must present the grand jury with evidence it may have which would tend to negate guilt" [App. A, p. ix]. The appellate opinion holds that the federal system will not follow recent state decisions requiring the grand jury to review available exculpatory evidence. (See, e.g., *Johnson v. Superior Court,* 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975).

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[1]Under the federal Food, Drug & Cosmetic Act, the first offense with which defendant is charged is a misdemeanor, 21 U.S.C. §333(a), but §333(b) provides that a second offense is punishable by imprisonment of up to three years or a fine of $10,000 or both, which penalty under 18 U.S.C. §1 is declared a felony.

This appellate opinion must be examined in light of federal court pronouncements on the subject. The Supreme Court stated in *United States v. Calandra,* 414 U.S. 338 at 343 (1974):

> The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.

Other federal decisions underscore the importance of the second grand jury duty. *Hoffman v. United States,* 341 U.S. 479 at 485 (1951) states: "(T)he most valuable function of the grand jury (has been) not only to examine into the commission of crimes, but to stand between the prosecutor and the accused . . ." Another opinion holds that if the prosecutor is fair and acts with conscientiousness then the grand jury retains its capacity to reach an independent judgment; if he is not then the grand jury will lose its capacity for fairness for its judgment will be based on biased and distorted facts. *Peter v. Kiff,* 407 U.S. 493 at 501-504 (1972). Thus the prosecutor's duty extends beyond avoidance of suppression and includes an affirmative obligation to produce evidence in his possession or control which tends to negate guilt. Any prosecutorial manipulation of evidence which substantially impairs the grand jury's ability to reject charges which it believes to be unfounded is an invasion of the defendants' constitutional right. *U.S. v. Wells,* 163 F. 313 at 325 (D.C. Idaho, 1908).

Petitioners heartily agree that the grand jury's ability to protect citizens against unfounded accusations depends upon its autonomy and capability for independent decision making, its receptivity to evidence of innocence as well as guilt. Ample precedent supports this view and would seem directly to contradict the appellate decision. Omissions of exculpatory evidence on the part of the government also violate the American Bar Association's Standard for Criminal Justice (Standards Relating to the Prosecution Function and the Defense Function) Section 3.6 which states in part: "The prosecutor should disclose to the grand jury any evidence which he knows will intend to negate guilt.[2] Thus, the appellate court's holding conflicts not only with opinions of the Supreme Court, but also with a standard of the legal profession. This conflict needs resolution, available only from the higher court.

(2) The scope of a grand jury's investigative power needs to be defined broadly enough to include an administrative hearing record containing exculpatory evidence.

The appellate court quoted from the above-cited case, *United States v. Calandra, supra,* at 343-344, as follows:

> A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been

[2]It should be noted that this standard of fairness regarding production of evidence does not require the prosecutor to seek out evidence of innocence; rather the obligation to produce is confined to evidence in his control or within his awareness and ability to produce.

committed and whether criminal proceedings should be instituted against any person.

An expanded rendering of the passage reveals the following sentences before and after the quoted portion.

> "The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement."
>
> "The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."

It can be seen that a more complete reading gives added emphasis to the necessity of a broad scope of investigation to achieve fairness as well as effectiveness in law enforcement. Petitioners contend that in the instant case the prosecution narrowed the grand jury's investigation in an unfair manner.

Prior to the commencement of this criminal prosecution the Food and Drug Administration called a "Section 305" hearing [21 U.S.C. 335].[3] Pursuant to FDA instructions, petitioners at the hearing submitted exculpatory evidence in written form as "Statement of Y. Hata & Co." The statement concerned petitioners' good faith, serious attempts and subsequent success at alleviating potential violations.

[3]It is conceded that the holding of such a hearing is not a condition precedent to the filing of a criminal prosecution. *U.S. v. Dotterweich*, 320 U.S. 277 at 278-279 (1943). However, 21 U.S.C. 335 indicates quite clearly that Congress considered the institution of a criminal proceeding to be an extremely serious matter. Thus the section implicitly provides that, if a hearing is initiated by the FDA, fair notice, an opportunity for the potential defendants to present their views, and procedural due process must be insured.

The document was admissible before the grand jury. It provided evidence relating to Hawaiian laws protecting birds, the presence of anti-bird devices at all entrances of the warehouse (with photos), and the fact that petitioners were already planning the construction of a wire cage.[4]

Petitioners thus presented their defense and had a right to expect that no decision to prosecute would be made until consideration had been given to their statements.[5] Nevertheless, out of the array of evidence presented at the preliminary Section 305 hearing, the prosecutor chose to present to the grand jury only the evidence supporting guilt, keeping the grand jurors ignorant of the exculpatory evidence which the Justice Department had in its control. By omitting

[4]If the grand jury or trial jury had been shown the "Statement of Y. Hata & Co., Inc." they would have learned from page 9 [of the statement] that:

> . . . A new wire cage 60′ x 60′ x 25′ high has been constructed in the warehouse as shown on the sketch and photographs (Exhibit 13). The cage will be used to store rice and flour and is intended to keep birds and rodents that may enter the warehouse from attacking the bags. This unit is believed to be the only one of its kind in the Islands for the stated purpose and changes will be necessary. The cage is wired on all four sides from the floor to the ceiling. Provisions are now being considered for periodically fumigating the merchandise in the cage and also affixing a ventilation system to drop the temperature to cope with the insects. Consultation and advice of professionals in the field have been sought in the construction of the experimental cage.

[5]At present the government can and does use self-incriminating evidence obtained from a Section 305 hearing. The appellate opinion suggests a motion to suppress prior to trial to solve the problem (App. A, p. x). However, petitioners would not have prevailed on a motion to suppress evidence at their Section 305 hearing, since the information in question was voluntarily given with the concurrence of petitioners' attorneys. *United States v. Andreadis*, 234 F. Supp. 341 at 347-348 (E.D.N.Y. 1964).

the written "Statement of Y. Hata & Co.," the prosecutor imparted a bias to the grand jury, depriving the appellants of their constitutional entitlement to the grand jury's independent unprejudiced decision.

The petitioners argue that the Section 305 hearing provisions are due process precautions to protect conscientious manufacturers and distributors against unfair criminal prosecutions under the Federal Food, Drug and Cosmetic Act[6] and that the protection can be effective only if exculpatory evidence from the hearing record is presented to the grand jury.

Since the trial court's judgment was made according to the proposition that "the U.S. Attorney is not required to present exculpatory evidence to the grand jury", petitioners respectfully argue that the Court should rule that reversible error was committed when the trial court denied petitioners' motion to dismiss the original indictment.

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[6]The FDA does not conduct any follow-up inspections of a suspected facility until after the criminal proceedings have been concluded. In this case petitioners contested the accuracy of many aspects of the FDA inspection report and asked FDA compliance officers to re-inspect their facility. The FDA refused to make an inspection until after the criminal trial was concluded. FDA made no inspection of the Y. Hata & Co.'s warehouse in Honolulu, Hawaii from the original inspection in May-June, 1972 until after the trial in November, 1974.

If the prosecution was required to present Section 305 hearing records to a federal Grand Jury, then corporate executives would be encouraged to present their views and *solutions* regarding the alleged criminal violations at hearings rather than to fight it out in court. This procedure would force FDA to make second inspections to ascertain the accuracy of original inspections reporting the alleged violations. The follow-up inspections would protect the public by seeing that a problem, if it really did exist, was corrected. Moreover, this procedure would reduce court actions, since the agency would take a second hard look at the alleged violation before going to the grand jury for an indictment.

B) APPELLATE COURT'S OPINION FAILS TO CONSIDER THE GROUNDS WARRANTING THE CRUCIAL INSTRUCTION ON "OBJECTIVE IMPOSSIBILITY" AS REQUESTED BY PETITIONERS AT THE TRIAL COURT LEVEL.

At the time of trial in November, 1974, all parties in this action awaited the decision of the Court in *United States v. Park,* 421 U.S. 658 (1975).

Petitioners urged, unsuccessfully, that the following proposed instruction be given to the jury:

Defendants' Instruction No. 11:[7]

> "The law requires the responsible individuals in a corporation in the food business to see to it that the food handled by the corporation is not allowed to become adulterated while it is held for sale by the corporation. *However, the law does not impose an impossible burden upon corporate officials. It does not make them insurers.* While personal participation in the adulteration or intent to cause the adulteration need not be shown by the government, the government must show some act performed by the defendants caused the adulteration or that some act that they could reasonably have been expected to perform could have prevented the adulteration. Absent proof of one or the other, you must return a verdict of not guilty as to that count." (Emphasis added).

Unlike the defendant of the *Park* case, these petitioners requested that the government "prove beyond a reasonable doubt that [petitioner] was not without

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[7]Petitioners request Defendants' Instruction No. 11

> ". . . on the ground that this is a proper statement of the law as it presently stands today. And, if not, should be the law."

the power or capacity to affect the conditions". *U.S. v. Park, supra,* at page 676.

Instead of issuing these guidelines, the trial court instructed the jury that if the corporation held food under unsanitary conditions then petitioner Minoru Hata could be found guilty if he held a "responsible position related to the adulteration by the corporation." (App. A, p. v). Such instruction did not conform to the legal standard which the U.S. Supreme Court has previously set out and recently clarified in *U.S. v. Park, supra,* at 672-673.

The appellate opinion held that petitioners were not entitled to the requested instruction of the defense of "objective impossibility" because there was no proof or offer to prove that the wire cage system could not have been implemented long before the FDA inspections in May and June 1972. The appellate court held that "the duty imposed by the Court in *Park* to remedy violations when they occur, 421 U.S. at 672, includes the duty to consider and experiment with a device so commonplace as a wire cage at the time long before that of the FDA inspections in 1972." (App. A, p. viii).

The fact is that the trial court prevented petitioners from introducing direct evidence (photographs) on construction of the cage by sustaining the government's objections that the cage did not exist at the time of FDA inspection in May and June of 1972 and that therefore no evidence about it could be heard. The trial court in sustaining this objection prevented the petitioners from offering direct evidence

supporting the "objective impossibility" of having had the cage in place in May of 1972, and thereby eliminated the government's burden to show the appellants had the power to prevent or correct the condition.

Reacting to the situation at hand and without the benefit of hindsight, petitioners' attorneys did not press the matter by making an offer of proof to the trial judge on the difficulty of obtaining materials to build the cage in Hawaii.

However on cross-examination, FDA Inspector Warthen gave the following testimony regarding the aforementioned cage:

> "Q. [McKray] Now, you said that the [defendants] discussed a cage for the warehouse.
>
> A. [Warthen] Yes.
>
> Q. And can you tell us what type of cage they were describing?
>
> A. Mr. Ueki first said that he had contacted, I think, someone in materials or a contractor to try to see how much it would cost to build one.
>
> The Court: Build what?
>
> The Witness: A cage in the center of the warehouse, somewhere in the warehouse, to put the rice and other items so the birds couldn't reach them. Then on June 6th when I was getting ready to leave, after we had had a final discussion, he brought me a sketch as I was leaving the warehouse. He caught me and he had a sketch of some sort of a cage that he was proposing and he wanted to know what my advice would be. I said it looked okay. My only comment that I can recall is that I thought the cage should extend all the way to the ceiling so the bird's

couldn't land on top of the wire cage and over stored products.

Q. And did they take your advice?

A. I don't know. I haven't been back."

Later FDA Inspector Warthen testified:

"Q. In your report did you write anything about bird control?

A. Yes.

Q. And what did you write, if you recall?

A. Essentially what I said here about the hanging of the pans over the doors. I said something about the attempt that Randy had informed me about the rubber strips. I also included, I believe, the part about our discussion of the cage that they were trying to build or thinking of building."

The testimony of the FDA Inspector shows that petitioners were maintaining "the highest standard of foresight and vigilance", in light of the fact that no experts, including the FDA inspectors, had come up with the solution of a cage to be built within the warehouse prior to 1972.

In spite of the trial restrictions, petitioners believe there was sufficient evidence presented to the jury for the requested instruction on "objective impossibility". On this basis petitioners request a new trial so evidence can properly be presented to the jury in accordance with the guidelines expressed in *United States v. Park, supra.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated, June 2, 1976.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Y. Hata & Company, Limited, a corporation, Defendant-Appellant.	No. 75-1681
United States of America, Plaintiff-Appellee, vs. Minoru Hata, Defendant-Appellant.	No. 75-1680

OPINION

[May 5, 1976]

Appeal from the United States District Court
for the District of Hawaii

Before: BROWNING and WRIGHT, Circuit Judges, and ANDERSON,* District Judge.

PER CURIAM:

This is an appeal from convictions of a corporation and its agent under the Federal Food, Drug and Cosmetic Act (the Act) [June 25, 1938, c. 675, 52 Stat. 1040; 21 U.S.C. § 301 *et seq.*].

*Honorable J. Blaine Anderson, United States District Judge for the District of Idaho, sitting by designation.

Appellants argue:

(1) The trial court should have instructed the jury that defendants could not be convicted if it was "objectively impossible" for them to prevent violations of the law; and

(2) The indictment should have been dismissed because of systematic discrimination in the enforcement of the Act.

We reject both contentions, and affirm.

The indictment was based upon inspections in May and June of 1972 of a multi-food storage warehouse owned by Y. Hata & Co., Ltd. (the corporation) on the island of Maui, Hawaii. The Federal Food and Drug Administration (FDA) discovered during those inspections that birds were flying in and out of the warehouse, perching on overhead sprinkler pipes and on bags of rice, and eating from rice bags. Bird excreta were found on some rice bags.

In November 1973, a single, three-count indictment was filed charging the corporation, along with its president, Minoru Hata, and one Randy Ueki, with violations of the Act. After a jury trial both the corporation and Hata were convicted on one count, and acquitted on two.[1] This appeal involves only the convictions on Count III, dealing with adulteration of rice.

[1]The indictment against Ueki was subsequently dismissed, and he is not a party to this appeal.

I.

THE "OBJECTIVE IMPOSSIBILITY" DEFENSE

A. *United States v. Park,* 421 U.S. 658 (1975).

United States v. Park controls this appeal.[2] In that case defendant Park, the chief executive officer of a national retail food chain, was convicted and fined under Section 303 of the Act [21 U.S.C. § 333] for violation of Section 301(k) [21 U.S.C. § 331(k)]. After the presentation of evidence, defense counsel challenged the jury instructions which were patterned after language in *United States v. Dotterweich,* 320 U.S. 277 (1943). *See Park,* 421 U.S. at 665 & n.9. Defense counsel did not, however, request an instruction to the effect that "the Government was required to prove beyond a reasonable doubt that respondent was not without the power or capacity to affect the [violative] conditions . . . ." *Id.* at 676.

A divided Fourth Circuit reversed the conviction, ruling that due process required proof of "some act of commission or omission," and that the trial judge failed to so instruct the jury. *United States v. Park,* 499 F.2d 839, 841-42 (4th Cir. 1974). It suggested that on retrial the government must prove "wrongful actions," defined as "gross negligence and inattention" to responsibilities. *Id.* at 842.

The Supreme Court reversed. It first held:

> [T]he Government establishes a prima facie case when it introduces evidence sufficent to warrant

[2]This case was on direct appeal at the time of filing of the Supreme Court's opinion in *Park. See Hamling v. United States,* 418 U.S. 87, 102 (1974); *Linkletter v. Walker,* 381 U.S. 618, 627 (1965).

> a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

421 U.S. at 673-74. By this language the Court reaffirmed the *Dotterweich* "responsible relation" concept. *See* 421 U.S. at 668-70.

However, the Court in *Park* read the Act as imposing upon corporate officers a duty to maintain "the highest standard of foresight and vigilance . . . [without requiring] that which is objectively impossible." 421 U.S. at 673.

The Court next held in *Park* that the jury instruction, read as a whole, fairly apprised the jury of the need to focus on defendant's "accountability, because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him." 421 U.S. at 675. It suggested that, while the instruction might have been clearer, the failure to amplify was not an abuse of discretion. *Id.*

Finally, in dictum the Court stated that if requested an instruction on "objective impossibility" or lack of "power or capacity" should be given if defendant first presents sufficient evidence to put such a claim at issue.[3] 421 U.S. at 676-77 & n.19.

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[3]The Court's suggestion, 421 U.S. at 676, that a district court's failure to give *sua sponte* the "objective impossibility" instruction may under some circumstances constitute "plain error," implies that the instruction must be given when requested and warranted by facts presented by the defendant. *See also* 421 U.S. at 673.

B. *Application Of Park To This Appeal*

This appeal, as did that in *Park,* involves Sections 301(k) and 303 of the Act. In the case at bar the trial court instructed the jury:

> [Y]ou must find beyond a reasonable doubt . . . that they [Hata and Ueki] held responsible positions . . . related to the part of the business . . . which caused the adulteration. . . .
>
> You are instructed that the government need not prove that the defendants knew that they were violating the law or that they intended to violate the law. Good faith or good intent is not a defense to this crime. . . .
>
> [Y]ou may find that the defendants Minoru Hata and Randy H. Ueki guilty if you find that at the time the corporation caused the adulteration, the defendants held responsible positions related to the adulteration by the corporation.

This instruction tracks closely with the one found acceptable by the Court in *Park. See* 421 U.S. at 674. We cannot say that, "viewed in the context of the overall charge," 421 U.S. at 674, the instruction in this case failed to comply with *Park.*

In the instant case, unlike that in *Park,* the defendants specifically requested an "objective impossibility" instruction.

We assume, as did the Court in *Park,* that if sufficient appropriate facts are shown, a proper "objective impossibility" instruction must be given if requested. We next consider whether such an instruction was required here.

Since the impuissance or "objective impossibility" defense is " 'to be raised defensively at a trial on the merits' ", *Park,* 421 U.S. at 673, quoting *United States v. Wiesenfeld Warehouse Co.,* 376 U.S. 86, 91 (1964), it is appropriate to analogize to the entrapment defense.

In *United States v. Payseur,* 501 F.2d 966, 971 (9th Cir. 1974), we stated:

> When a material question of fact on the issue of entrapment has been presented, the court must submit the issue to the jury. However, whether the elements of the defense have become an issue of fact for the jury is to be determined by the trial judge. [Citing cases.]

In *United States v. Christopher,* 488 F.2d 849, 850-51 (9th Cir. 1973), we provided the following guideline for determining whether sufficient evidence was present to mandate the giving of an entrapment instruction:

> The slight testimony which we have held allows the issue of entrapment to go to the jury must still constitute some evidence of inducement or persuasion by the Government.

Compare Pierce v. United States, 414 F.2d 163, 166 (5th Cir. 1969). *Cf. Perkins v. United States,* 315 F.2d 120, 124 (9th Cir. 1963).

Applying these standards to the case before us, we find that appellants were not entitled to the instruction requested.

From both the record and appellants' opening brief it is clear that appellants were aware of the bird in-

festation problem as early as August 1971. Appellants tried numerous devices to prevent birds from entering the company warehouse. None was completely successful. At the time of the FDA inspections in May and June 1972, appellants were planning to enclose the food storage area of the warehouse in a huge wire cage which, according to the corporation's attorney, would be "a perfect setup against these birds."

Appellants' argument is:

> [*A*]*t the time of the inspection* the appellants were powerless to construct the cage because materials had not arrived from the mainland of the United States.

(Emphasis added.) However, it is apparent from the record that appellants had not seriously considered the wire cage scheme until the spring of 1972.

Appellants also seem to argue that it was not "objectively possible" for them to conceive of the wire cage system substantially before the FDA inspections. This is so, they contend, despite their maintenance of "the highest standard of foresight and vigilance." *Park,* 421 U.S. at 673.

Appellants' premise is that the "objective impossibility" defense is available to anyone, organization or individual, offering to prove inability to prevent or correct in timely fashion a violation despite maintenance of the highest standard of foresight and vigilance. The government argues that this reading of *Park* is far too broad; that the defense is available only to the corporate officer and not to the corporation

itself, and applies only when the officer was in fact powerless to prevent or correct the violation, even by suspending the corporation's food warehousing activity if necessary. We need not and do not choose between these and other possible readings of *Park,* for even if appellants' interpretation were correct the defense would not be available on the facts of this case.

There was no proof or offer to prove that the wire cage system could not have been implemented long before the FDA inspections in May and June 1972. Nor could there have been such proof or offer. A wire cage is scarcely a novel preventive device. One maintaining far less than the requisite "highest standard of foresight and vigilance" would have recognized as early as August 1971 that implementation of a wire cage system would substantially, if not completely, prevent access by thieving and untidy birds.

In the context of this case, the duty imposed by the Court in *Park* to "remedy violations when they occur," 421 U.S. at 672, includes the duty to consider and experiment with a device so commonplace as a wire cage at a time long before that of the FDA inspections in 1972.

Nowhere have the appellants offered to prove that they planned and attempted to install the wire cage system at any time prior to the spring of 1972. Even had they done so, they would have had to offer proof that installation prior to the May and June 1972 inspections was frustrated by the inability to obtain materials from any source. We find no such offer. In fact, the trial record discloses no evidence at all

of the difficulty of obtaining materials from the mainland. It is merely an assertion in the appellants' brief.

We conclude, therefore, that even under appellants' reading of *Park,* appellants were not entitled to an "objective impossibility" instruction.

II.

ALLEGED DISCRIMINATION IN ENFORCEMENT OF THE ACT

We reject appellants' contentions that the prosecution must present the grand jury with evidence it may have which would tend to negate guilt. Although some states have imposed a duty on the prosecution to disclose such evidence *(see, e.g., Johnson v. Superior Court,* 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (1975)), the federal system continues to give wide discretion to the prosecution.

During a grand jury proceeding there is no right of cross-examination, or of introducing evidence to rebut the prosecutor's presentation. *United States v. Levinson,* 405 F.2d 971, 980 (6th Cir. 1968). As the Court stated recently in *United States v. Calandra,* 414 U.S. 338, 343-44 (1974):

> [A] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.

This policy is based upon an abiding confidence in the jury trial system. "[T]he greatest safeguard to the liberty of the accused is the petit jury and the

rules governing its determination of a defendant's guilt or innocence." *Silverthorne v. United States,* 400 F.2d 627, 634 (9th Cir. 1968).

We reject appellants' contention that the government abused to such an extent the hearing process provided for in the Act [21 U.S.C. § 335], as to require dismissal of the indictment. We also reject the contention that the government cannot use "self-incriminating evidence obtained unfairly from the 21 U.S.C. § 335 hearing." Since this contention was not made in a motion to suppress prior to trial, it is deemed waived. Fed. R. Crim. P. 12(b)(2).

Finally, we reject appellants' argument that there was "sufficient pretrial publicity to warrant dismissal of the criminal indictment." Appellants concede that "the trial court did obtain an impartial jury through normal means. . . ." Their only argument is that the pretrial publicity was somehow a denial of due process.

The argument is both novel and without merit. The pretrial publicity issue pertains to the ultimate fairness of the trial, not to the conduct of the government in promoting the prosecution. *See United States v. Abbott Laboratories, Inc.,* 505 F.2d 565, 571 (4th Cir. 1974). By conceding that the jury was "impartial," the appellants thereby conceded that pretrial publicity did not negative the fairness of the trial.

III.

CONCLUSION

The convictions of Minoru Hata and of Y. Hata & Co., Ltd. are affirmed.

Appendix B

United States District Court
for the
District of Hawaii

Criminal No. 73-13332

United States of America,
vs.
Y. Hata & Co., Ltd., et al

[Filed Feb. 18, 1975]

On this 18th day of February, 1975 came the attorney for the government and the defendant appeared in person and[1] by counsel, JAMES H. KAMO, Esq.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty, Y. HATA & CO., LTD. has been convicted of the offense of having been convicted on Aug. 9, 1971 in this Court for violation of the Federal Food, Drug, and Cosmetic Act, Court Docket No. 12,753, & before the conviction having become final, received a number of bags of rice, which had been shipped in interstate commerce from Abbeville, Louisiana, and while said rice was being held for sale, caused said rice to be held in a building that was accessible to rodents, birds, and insects, and caused the rice to be exposed to contamination by rodents, birds, and insects; which acts resulted in the rice being adulterated in that said food was held under insanitary conditions whereby it may have become contaminated with filth; in violation of Sections 331(k) and 333(a) of Title 21, United States Code, as

charged[3] in COUNT III of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant corporation pay a fine to the United States in the sum of $3,000.00, said fine payable within 30 days.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Samuel P. King
United States District Judge.

The Court recommends commitment to[6]

/s/ Walter A.Y.H. Chinn
Clerk.

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[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

United States District Court
for the
District of Hawaii

Criminal No. 73-13332

United States of America,

vs.

Minoru Hata, et al

[Filed Feb. 18, 1975]

On this 18th day of February, 1975 came the attorney for the government and the defendant appeared in person and[1] by counsel, GEORGE McKRAY, Esq.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty, MINORU HATA has been convicted of the offense of having been convicted on Aug. 9, 1971 in this Court, for violation of the Federal Food, Drug, and Cosmetic Act, Court Docket No. 12,753, & before the conviction having become final, received a number of bags of rice, which had been shipped in interstate commerce from Abbeville, Louisiana, and while said rice was being held for sale, caused said rice to be held in a building that was accessible to rodents, birds, and insects, and caused the rice to be exposed to contamination by rodents, birds, and insects; which acts resulted in the rice being adulterated in that said food was held under insanitary conditions whereby it may have become contaminated with filth; in violation of Sections 331(k) and 333(a) of Title 21, United States Code, as charged[3] in COUNT III of the Indictment and the court having

asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine to the United States in the sum of five hundred dollars, ($500.00), said fine payable within 30 days.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Samuel P. King
United States District Judge.

The Court recommends commitment to[6]
/s/ Walter A.Y.H. Chinn
Clerk.

---

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

Appendix C

(Letterhead of
State of Hawaii
Department of Land and Natural Resources
Division of Fish and Game
530 South Hotel Street
Honolulu, Hawaii 96813)

August 26, 1971

Mr. James H. Kamo
Attorney at Law
Suite 602 City Bank Bldg.
810 Richards Street
Honolulu, HI 96813

Dear Mr. Kamo:

Following receipt of your letter of August 6 asking our assistance in resolving the bird problem at Y. Hata & Company I had two of my staff members conduct an investigation of the problem by talking with Mr. Randy Ueki and making an on-site investigation of the building in which rice and grain are being stored. A copy of our investigation report is enclosed for your information. Following the recommendation made by our investigators we have issued to Mr. Randy Ueki a permit to destroy birds constituting a nuisance. If we learn of a practical means of keeping the birds out of the building we will be sure to so ad-

vise Mr. Ueki. In the meantime if you or your client have any questions please call me at 548-4000.

Yours truly,
/s/ Michio Takata
Michio Takata, Director
Division of Fish & Game

MT:rfm
Encl.
Sample No. 073-864 F-
Enriched Flour

Exhibit 15
(Page 1)

August 24, 1971

COMPLAINANT: James H. Kamo, Attorney at Law, representing Y. Hata & Company, Ltd.

SUBJECT: House sparrow *(Passer domesticus)*, Lace-necked *(Streptopelia chinensis)* and Barred *(Geopelia striata)* doves causing Y. Hata & Company, Ltd. to be cited by the United States Government for violation of 21 U.S.C., Sections 331 & 333—storage of food in a building accessible to birds.

INVESTIGATION: Warden Kikuchi and I met with Mr. Randy Ueki, Manager, Y. Hata, at the storage facility at 741 Ilalo Street, Honolulu on August 23, 1971. This investigation was in response to a letter from Mr. James H. Kamo, Attorney at Law to Mr. Michio Takata, Director, Division of Fish and Game dated August 6, 1971 requesting assistance from this Division to rid Y. Hata of the bird problem.

The building is very large and appears to be bird proof except for three large doors that are left open for forklift movements.

The birds, according to Mr. Ueki come in during the day and leave by evening through these open doors. He does not think the sparrows nest in the building (no evidence of nesting was found). The doves, although venturing into the building infrequently, can't find their way out, and, according to Mr. Ueki, die.

Once in the building, the birds peck at the rice bags (most of which are now covered with plastic sheets) to get at the rice grain and defecate on the rice, floor bags and other stored food stuff.

The company has tried sound and rotating lights with timing devices, but, the birds become adjusted to these devices.

We suggested to Mr. Ueki that a saran cloth drape on the open doors may prevent the birds from entering and yet permit the forklift operator to see and drive through without getting off the lift or having another employee at each door as a doorman each time a forklift has to go through.

In view of the above mentioned complaint and investigation, we recommend that a permit to destroy the sparrows and doves in the warehouse be issued to Y. Hata & Company, Ltd., until a

method to prevent the birds from entering the building be devised.

Respectfully submitted,

/s/ Ralph Saito
Ralph Saito
Wildlife Biologist, Oahu

/s/ James Kikuchi
James Kikuchi
Fish & Game Warden, Oahu

Appendix D

In the United States District Court
for the District of Hawaii

Cr. No. 73-13332
[21 USC §§331(k) & 333(a)]

United States of America, Plaintiff,
vs.
Y. Hata & Company, Limited, a corporation, Minoru Hata, and Randy H. Ueki, Defendants.

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by the United States of America, Plaintiff, and Y. Hata & Company, Limited, Minoru Hata and Randy H. Ueki, Defendants, through their respective attorneys, for the purposes of this motion only, as follows:

1. The contents of pages 5 and 6 of thePre-sentence Investigation Report submitted by Clarence Y. C. Chang, U. S. Probation Officer, in United States of America v. Y. Hata & Company, Limited, et al., in Criminal No. 12,753 filed in the United States District Court of the District of Hawaii, may be admitted into evidence and the objection as to hearsay is waived. The objection as to relevance is reserved.

2. The Court imposed a $5.00 per count fine on the defendant corporation in the prior action, Cr. No. 12,753.

3. The defendant's written presentation at the 305 hearing was available to the U. S. Food and Drug Administration and was not presented to the Grand Jury by the U. S. Attorney's office prior to its return of its indictment in this proceeding. There was no reporter's transcript of the above proceedings requested or made.

4. The U. S. Food and Drug Administration, as a matter of policy, does not forward through the U. S. Attorney's office or the Justice Department copies of material submitted by the defendant at the 305 hearing (21 USC 335) or report of said hearings.

So Stipulated this 19 day of August, 1974, at Honolulu, Hawaii.

Respectfully submitted,

James H. Kamo, Edwin Y. Sasaki,
George Alexander McKray, and
Charles K. Marr,
By /s/ James H. Kamo
James H. Kamo
Attorneys for Defendants

Harold M. Fong
United States Attorney
District of Hawaii
By /s/ William C. McCorriston
William C. McCorriston
Assistant U. S. Attorney
Attorneys for Plaintiff